Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	File No. 97-31
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments	)	

To: The Commission

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard") hereby submits its comments in response to the Commission's public notice in the above-referenced matter.[1/] As shown below, the Commission should grant the Petition.

This proceeding concerns a basic, but important issue: the extent of the preemption of rate regulation of commercial mobile radio services ("CMRS") under Section 332 of the Communications Act.[2/] Except under circumstances that do not now apply anywhere in the

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1/ Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments Filed by Southwestern Bell Mobile Systems," DA 97-2464, rel. Nov. 24, 1997 (the "Public Notice"). By a later order, the date for filing comments in this matter was extended from December 24, 1997 to January 7, 1998. *See* Southwestern Bell Mobile Systems, *Order,* File No. 97-31, DA 97-2674 (Wireless Tel. Bur. Dec. 22, 1997). The Petition for a Declaratory Ruling shall be referred to herein as the "Petition."

2/ 47 U.S.C. § 332.

U.S., Section 332 preempts *all* state-level regulation of CMRS rates, regardless of whether the regulatory authority is granted via State utility statutes, other statutes or the common law. Moreover, despite the "consumer protection" language used to cloak them, the lawsuits that are the subject of the Petition seek to impose supposed State requirements on the rates charged by CMRS providers. Thus, the relief sought in those suits plainly is preempted by Section 332.

It is critical for the Commission to grant the relief sought by the Petition because Vanguard, along with the rest of the CMRS industry, has a vital interest in this matter. Vanguard, like most CMRS providers, follows the practices described in the Petition and has done so throughout its history. These practices are not sprung on unsuspecting consumers, but rather are part of the basic terms of service. Absent Commission action, Vanguard and hosts of other CMRS providers will continue to be subject to suits seeking to change the terms under which service is offered long after the costs of providing that service have been incurred. Thus, it is particularly important for the Commission to confirm that the rate regulation sought in these suits is preempted.

I. The Terms at Issue in this Proceeding Are Rates.

The central issue in this proceeding is whether charging for incoming calls, charging from the time a call is initiated and charging in whole minute increments constitute rates or "other terms and conditions" of the provision of CMRS. While there may be circumstances where it is difficult to characterize a particular term of service, that is not the case here. It is evident that any mechanism for determining the charge for a service must be treated as

part of the rates for that service and that such a mechanism also cannot be among the "other terms and conditions" that are subject to some State regulation.

As a threshold matter, it is impossible to separate the charges for a service from the mechanism by which those charges are assessed. It is not enough to say that a rate is "five cents a minute" without saying how those minutes are counted and to whom those charges are assessed. A rate is meaningless unless both charges and time elements are delineated. For that reason, the meaning of a rate is inextricably tied to the way the charge is calculated — minute by minute, second by second or otherwise.[3/] Historically, different rates were charged for the first minute or first three minutes of a toll call and for the remainder of the call and it is only within the last ten years that this practice has disappeared. Indeed, some long distance carriers now offer rate plans that have minimum usage requirements, which means that the "per minute" rate charged to a customer can vary widely depending on how many minutes of calls actually are made.[4/]

In addition, the existence of alternative mechanisms for charging customers does not affect the status of a particular mechanism as a rate. In other words, a rate based on charges for each minute or portion thereof is still a rate if it is possible to charge individually for each six seconds; a rate that starts calculating the length of a call based on the moment of

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3/ For that reason, some CMRS providers, such as Nextel, seek a competitive advantage by charging for calls in smaller increments than one minute.

4/ All of these practices also are followed in other businesses. For instance, parking garages typically charge from the moment the customer enters the garage, not from when the car is parked, and the time spent in the garage is "rounded up" to the next whole hour.

call initiation is still a rate even if it is possible to calculate the length of the call based on the moment of call completion; and a rate charged for incoming calls is still a rate even if it is possible not to charge for such calls. The availability of these additional options for determining rates does not transform a CMRS rate into something else any more than the availability of inbound WATS transformed MTS rates into something other than rates.

Not only do the practices that are the subject of this proceeding constitute rates, they also cannot fall within the category of "other terms and conditions" that may be regulated by the States. As a practical matter, rate-related issues cannot be included within the scope of "other terms and conditions" if Section 332's preemption of rate regulation is to have any meaning. Indeed, the characterization of a regulation as "consumer protection" should have no impact on determining whether the regulation is preempted: Section 332(c)(3)(A) specifically provides that "no State . . . shall have *any* authority to regulate" CMRS rates.[5/] Rather, if the regulation affects rates, it must be considered a rate regulation.

This analysis is confirmed by the legislative history of Section 332. The House Report on the 1993 Budget Act amendments that adopted the preemption provisions of Section 332 lists a limited range of activities that are available to the States:

> customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis.[6/]

5/ 47 U.S.C. § 332(c)(3)(A).

6/ H.R. Rep. No. 111, 103rd Cong. 1st Sess. at 261.

Consistent with the specific preemption of State authority over rates in Section 332(c)(3)(A), none of these activities could give the States any power over the rates charged by CMRS providers. Indeed, the matters left within the States' jurisdiction fall within a limited class of police powers, not their general regulatory powers. This limited power permits a State to subject CMRS providers to liability for personal injuries they cause or to prevent garden variety fraud, but does not extend to any rate-related matters. Even as to "consumer protection matters," the list of permissible regulation does not encompass any matters that could be described as rates.

II. The Commission Should Issue the Requested Declaratory Ruling Because State Law Cannot Govern the Rates Charged for CMRS.

Once it is established that the practices at issue in this proceeding are rates, then it is evident that the Commission must grant the Petition. The preemption of State regulation of rates was central to the 1993 Budget Act amendments to Section 332 and no State may regulate CMRS rates at this time. Moreover, the relief requested in the class action suits described in the Petition depends entirely on State regulatory powers that are preempted by Section 332, so any such relief would be impermissible.

A. No State May Regulate CMRS Rates at this Time.

Section 332(c)(3) provides for State regulation of CMRS rates only under carefully limited circumstances. Because the requirements for such regulation have not been met in any State, rate regulation simply is not permitted. Indeed, there is less of a basis for regulating CMRS rates today than there was in 1993.

Under Section 332(c)(3), States may regulate CMRS rates only under two circumstances. First, States that regulated CMRS rates at the time Section 332 was amended were permitted to petition the Commission for authority to continue that regulation.[7/] Although several States filed such petitions, all of those requests were denied.[8/]

Second, the Commission may grant a State petition for authority to regulate the rates of CMRS providers if the State demonstrates that market conditions fail to protect consumers from unjust, unreasonable or discriminatory rates *and* that CMRS provides a substitute for "a substantial portion" of the landline service in the State.[9/] No such petition has been filed, let alone granted, since the passage of the 1993 Budget Act. In other words, the Commission never has exercised its power under Section 332 to permit States to regulate CMRS rates.

Even if a State were to seek rate regulation authority, it is inconceivable that the Commission would grant such a petition. The CMRS marketplace was highly competitive in 1993 and has become more competitive since that time. Some areas now have as many as five broadband CMRS providers competing for wireless customers, and the number of competitors will continue to grow as broadband PCS providers enter the market. The growth of competition has led to a wider variety of consumer choice, not only in providers, but also

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7/ 47 U.S.C. § 332(c)(3)(B).

8/ *See, e.g., Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842 (2d Cir. 1996) (The Second Circuit affirmed the FCC's denial of Connecticut's petition to maintain rate regulation over wholesale cellular rates); Petition of New York State Pub. Serv. Comm'n To Extend Rate Regulation, *Report and Order*, 10 FCC Rcd 8187 (1995); Petition on Behalf of the Louisiana Pub. Serv. Comm'n for Auth.to Retain Existing Jurisdiction over Commercial Mobile Radio Servs. Offered Within the State of Louisiana, *Report and Order*, 10 FCC Rcd 7898 (1995).

9/ 47 U.S.C. § 332(c)(3)(A).

in the rate plans offered to consumers.[10/] Consequently, any State petition for rate regulation authority would not pass the threshold requirement of showing that market conditions do not permit just, reasonable and non-discriminatory rates.

Moreover, only the Commission can decide whether a State will be permitted to engage in rate regulation and such a decision can be made only through the mechanisms described in Section 332(c)(3). No other entity, including State or federal courts, has the power to determine that CMRS rates can be regulated unless Congress changes the current provisions of Section 332(c)(3). Thus, no State is entitled to regulate CMRS rates at this time.

B. The Relief Requested in the Class Action Suits Would Constitute Impermissible Rate Regulation.

Section 332(c)(3) is not limited to traditional State regulatory commission regulation, but rather applies to any State or local regulation of CMRS rates. Consequently, any claim based on State law that would have the effect of regulating CMRS rates is barred by Section 332(c)(3). In addition, it does not matter what forum is used to attempt to regulate rates: State commissions, legislatures and the courts are barred from taking actions that regulate CMRS rates.

10/ In fact, many of the rate mechanisms that are sought in the class actions that are the subject of the Petition are now available as a result of some providers' efforts to distinguish their services from those of competitors.

Section 332(c)(3) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . ."[11/] This provision does not limit itself to traditional State regulatory activities, but rather eliminates "any authority" that a "State or local government" might have to regulate rates. Thus, State commission action regulating rates is not a prerequisite to preemption; any substantive element of State or local law that affects rates is preempted by Section 332(c)(3)(A). Indeed, statutes, regulations and common law requirements alike are within the scope of Section 332(c)(3)(A).

This conclusion is true whether the State acts through the legislature, a State agency or through the courts. It is well established that the actions taken by State courts and judicial officers in their official capacity are to be considered actions of the States within the meaning of the Fourteenth Amendment.[12/] Indeed, the Supreme Court has concluded that a State acts through its legislative, judicial and executive authorities, and "can act in no other way."[13/] For instance, in *Shelley v. Kraemer*, the Court recognized that actions by State courts in

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11/ 47 U.S.C. § 332(c)(3).

12/ *See, e.g., Shelley et ux. v. Kraemer et ux.*, 334 U.S. 1, 14 (1948); *Henry et al., v. First National Bank of Clarksdale et al.*, 444 F.2d 1300, 1309 (5th Cir. 1971) ("The clear message of *Shelley v. Kraemer* is that it is judicial enforcement of a private discriminatory contract that brings the otherwise 'private action' within the ambit of the fourteenth amendment."); *Knubbe, et al. v. Sparrow, et al.*, 808 F. Supp. 1295 (E.D. Mich 1992) (State action "includes actions of state courts and state judicial officials.") (citing *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948)).

13/ *Kraemer*, 334 U.S. at 14 (citing *Ex Parte Virginia*, 100 U.S. 339, 347 (1880)).

enforcing substantive common-law policies of the State are considered actions of the State.[14/] Similarly, the enforcement of a State law by a court constitutes State action.[15/]

Under this precedent, it is evident that State court action on the claims challenging rates charged by CMRS providers would constitute impermissible State action under section 332(c)(3)(A). Because the imposition of damages by a State court or the issuance of injunctive relief on the plaintiffs' rate claims involves a court determination as to what constitutes a reasonable rate charged by CMRS providers, such damages or injunctive relief prohibiting the CMRS providers from determining their own rates would constitute a form of rate regulation. Put differently, any action by a State court on the plaintiffs' claims, whether in the form of injunctive relief or an award of damages, necessarily involves a judicial determination of the reasonableness of CMRS rates and therefore would constitute a form of State rate regulation in direct violation of section 332.[16/]

14/ *Id.* at 17.

15/ *Knubbe,* 808 F. Supp. at 1301 (citing *Heitmanis v. Austin,* 899 F.2d 521, 527 (6th Cir. 1990)); *see also USW, Local 2609 v. Bethlehem Steel Corp.*, 519 F. Supp. 595, 599 (D. Md 1981). Enforcement of State laws or policies in a State's federal courts would equally constitute State action, when the State law claims are brought before the federal court for diversity reasons or via the court's supplemental jurisdiction.

16/ *See* Petition at 17-24 and accompanying footnotes.

III. Conclusion

For all these reasons, Vanguard Cellular Systems, Inc. respectfully requests that the Commission act in accordance with these comments.

Respectfully submitted,

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January 7, 1998

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 7th day of January, 1998, a copy of the foregoing "Comments of Vanguard Cellular Systems, Inc." was sent by first-class mail, postage prepaid, to the following:

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